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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 778.

JOHN MATTHEWS, PLAINTIFF IN ERROR AND APPELLANT,

vs.

THE UNITED STATES.

IN ERROR TO AND APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 15, 1895.

(16,068.)

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between The United States of America, plaintiff, and John Matthews, defendant, a manifest error hath happened, to the great damage of the said defendant, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the twenty-fifth day of May, 1895, that, the record and proceedings aforesaid being inspected, the said justices of the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-fifth day of April, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

ADDISON BROWN, *U. S. D. J.*

2 [Endorsed:] E. & A. B. 1347. The U. S. circuit court of appeals for the second circuit. United States, plaintiff in error, *vs.* John Matthews, defendant in error. Writ of error. Hess, Townsend & McClelland, attorney- for defendant in error, 40 & 42 Wall street, N. Y. city. Due service of a copy of the within writ of error is hereby admitted this 25th day of April, 1895. ——— ———, attorney for plaintiff in error. A copy of the within paper has been this day received at this office. Apr. 25, 1895. Wallace MacFarlane, U. S. attorney. S. U. S. circuit court. Filed Apr. 25, 1895. John A. Shields, clerk. 1.45 p'd 4, 27.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three (3) to fifty-four (54), inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of John Matthews, plaintiff in error, against The United States, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this tenth day of October, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A SHIELDS, *Clerk.*

3 TUESDAY, *June 19th*, 1894.

The court meets pursuant to adjournment and is opened by proclamation.

Present: Hon. Charles L. Benedict, judge.

The grand jury come into court, and, being called, they severally answer to their names.

They present the following bill of indictment.

THE UNITED STATES
vs.
JOHN MATTHEWS. } Perjury. Sec. 5392.

WEDNESDAY, *June 20th*, 1894.

The court meets pursuant to law and is opened by proclamation.

Present: Hon. Charles L. Benedict, judge.

THE UNITED STATES
vs.
JOHN MATTHEWS. } Perjury. 5392.

On motion of U. S. attorney, ordered arraignment.

The defendant, on being arraigned, pleads not guilty to the indictment against him.

4 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, begun and held in the city of New York, within and for the district and circuit aforesaid, on the second Wednesday of May, in the year

of our Lord one thousand eight hundred and ninety-four, and continued by adjournment to and including the nineteenth day of June, in the year of our Lord one thousand eight hundred and ninety-four.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America within and for the district and circuit aforesaid on their oath present that heretofore, to wit, on the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and ninety-four, at the southern district of New York and within the jurisdiction of this court, there came on to be tried in the said court, before the Honorable Charles L. Benedict, then and still judge thereof, and a jury duly empaneled and sworn for that purpose, a certain issue in due manner joined between the said United States and one John Matthews, impleaded with one Thomas E. Jones and one William T. Todd, upon a certain criminal indictment then depending in the said court against them, the said John Matthews, Thomas E. Jones, and William T. Todd, for having, on the 20th day of October, in the year of our Lord one thousand eight hundred and ninety-two, at the southern dis-
5 trict of New York and within the jurisdiction of this court, wickedly, designedly, falsely, and fraudulently intending to cheat and defraud the United States of America of their lawful duties of customs, unlawfully and fraudulently conspiring, combining, confederating, and agreeing together to cause and procure certain goods, wares, and merchandise which should thereafter be imported and brought into the port of New York from foreign countries, and in respect whereof certain duties and customs should then and there be due and payable to the United States, to be taken and carried away from the said port and to be delivered to the respective owners or consignees thereof without payment to the said United States of America of any part of the duties of customs so then and there due and payable therein to the said United States as aforesaid, with intent thereby then and there to defraud the United States in their said revenue of customs by then and there collecting from the respective owners and consignees of said goods, wares, and merchandise the duties of customs so then and there due and payable thereon to the said United States as aforesaid, with the intent to retain and appropriate the amount of said duties of customs to their own use and benefit, and then and there, by the means aforesaid, defraud the said United States of their revenue of duties of customs, and that on the eighteenth day of April, in the year of our Lord one thousand eight hundred and ninety-three, they, the said John Matthews, Thomas E. Jones, and William T. Todd, at the southern district of New York and within the jurisdiction of this court, and
6 in pursuance and prosecution of the said conspiracy, combination, confederacy, and agreement, and with the intent to effect the object of the said conspiracy aforesaid, did unlawfully and willfully direct and cause one Samuel Nicholas to obtain, procure, and deliver to the said John Matthews, Thomas E. Jones, and William

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three (3) to fifty-four (54), inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of John Matthews, plaintiff in error, against The United States, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this tenth day of October, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

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4 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, begun and held in the city of New York, within and for the district and circuit aforesaid, on the second Wednesday of May, in the year

of our Lord one thousand eight hundred and ninety-four, and continued by adjournment to and including the nineteenth day of June, in the year of our Lord one thousand eight hundred and ninety-four.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America within and for the district and circuit aforesaid on their oath present that heretofore, to wit, on the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and ninety-four, at the southern district of New York and within the jurisdiction of this court, there came on to be tried in the said court, before the Honorable Charles L. Benedict, then and still judge thereof, and a jury duly empaneled and sworn for that purpose, a certain issue in due manner joined between the said United States and one John Matthews, impleaded with one Thomas E. Jones and one William T. Todd, upon a certain criminal indictment then depending in the said court against them, the said John Matthews, Thomas E. Jones, and William T. Todd, for having, on the 20th day of October, in the year of our Lord one thousand eight hundred and ninety-two, at the southern district of New York and within the jurisdiction of this court, wickedly, designedly, falsely, and fraudulently intending to cheat and defraud the United States of America of their lawful duties of customs, unlawfully and fraudulently conspiring, combining, confederating, and agreeing together to cause and procure certain goods, wares, and merchandise which should thereafter be imported and brought into the port of New York from foreign countries, and in respect whereof certain duties and customs should then and there be due and payable to the United States, to be taken and carried away from the said port and to be delivered to the respective owners or consignees thereof without payment to the said United States of America of any part of the duties of customs so then and there due and payable therein to the said United States as aforesaid, with intent thereby then and there to defraud the United States in their said revenue of customs by then and there collecting from the respective owners and consignees of said goods, wares, and merchandise the duties of customs so then and there due and payable thereon to the said United States as aforesaid, with the intent to retain and appropriate the amount of said duties of customs to their own use and benefit, and then and there, by the means aforesaid, defraud the said United States of their revenue of duties of customs, and that on the eighteenth day of April, in the year of our Lord one thousand eight hundred and ninety-three, they, the said John Matthews, Thomas E. Jones, and William T. Todd, at the southern district of New York and within the jurisdiction of this court, and in pursuance and prosecution of the said conspiracy, combination, confederacy, and agreement, and with the intent to effect the object of the said conspiracy aforesaid, did unlawfully and willfully direct and cause one Samuel Nicholas to obtain, procure, and deliver to the said John Matthews, Thomas E. Jones, and William

T. Todd, from a certain bonded warehouse known as Casey's stores, at Nos. 151 to 165 Leroy street, in the city of New York, four certain cases of goods, wares, and merchandise, which said goods, wares, and merchandise had theretofore been imported into the port of New York, in the steamship City of New York, on the eighteenth day of April, in the year of our Lord one thousand eight hundred and ninety-three, which said goods, wares, and merchandise were then and there subject by law to the payment of customs duties and should have been invoiced, and which had not been invoiced, without paying or accounting for the duties of customs to which the said goods, wares, and merchandise were subject as aforesaid, under and upon the false and fraudulent pretext that they, said John Matthews, Thomas E. Jones, and William T. Todd, were then and there about to export and forward said goods, wares, and merchandise by the steamship Nevada to Liverpool, in the Kingdom of Great Britain, and under and upon the further false and fraudulent pretext that the said four cases so to be exported by the steamship Nevada to Liverpool as aforesaid contained furniture, whereas in truth and in fact the said four cases so as aforesaid imported into the port of New York as aforesaid in the steamship City of New York as aforesaid and obtained and procured as aforesaid from said
7 bonded warehouses did not contain furniture, but did contain goods, wares, and merchandise of great value, commonly known as and called Turkey carpet, as the said John Matthews, Thomas E. Jones, and William T. Todd then and there well knew; and whereas in truth and in fact the four cases of goods, wares, and merchandise which the said John Matthews, Thomas E. Jones, and William T. Todd did so as aforesaid obtain and procure as aforesaid and by the means aforesaid from said bonded warehouses, containing the said goods, wares, and merchandise so commonly known and called Turkey carpet, were thereupon in fact forwarded by the said John Matthews, Thomas E. Jones, and William T. Todd, in pursuance of such conspiracy, combination, confederacy, and agreement as aforesaid, to Messrs. Yates & Company, Limited, at Elizabethport, in the State of New Jersey, U. S. A., the consignees of said four cases of goods, wares, and merchandise, and the said John Matthews, Thomas E. Jones, and William T. Todd did then and there demand, collect, and receive from the said consignees, to wit, Messrs. Yates & Co., Limited, the sum of three hundred and eighty-five dollars and eighty cents on account of the duties of customs due to the said United States upon the said goods, wares, and merchandise so as aforesaid imported into the port of New York as aforesaid, in the steamship City of New York, on the eighteenth day of April, in the year of our Lord one thousand eight hundred and ninety-three, as aforesaid, and which said sum of three hundred and thirty-five dollars and eighty cents was then and there justly due and owing to the said United
8 States as the duties of customs upon said goods, wares, and merchandise, and which said sum the said John Matthews, Thomas E. Jones, and William T. Todd did then and there fraudulently appropriate to their own use and benefit without any right

whatsoever, and did unlawfully, willfully, falsely, deceitfully, and designedly defraud the United States of America of their said revenues of customs, and that at and upon the trial of the said issue in the said court, before the said judge and jury, to wit, on the seventh day of June, in the year of our Lord one thousand eight hundred and ninety-four, and within the district aforesaid and within the jurisdiction of this court, the said John Matthews, late of the city of New York, at his own request, appeared as a witness for and on his own behalf, he, the said John Matthews, being one of the defendants in the said indictment, and was then and there duly sworn and took his oath as such witness, before the said court, that the evidence which he, the said John Matthews, should give on the said trial should be the truth, the whole truth, and nothing but the truth, the said court then and there having due and competent authority to administer the said oath to the said John Matthews in that behalf, and, the said John Matthews so being sworn as aforesaid, it then and there, upon the trial of the said issue, became and was a material matter and inquiry whether or no he, the said John Matthews, did have business of any kind with Mr. Davis or his office (meaning Moses Davis, of Montreal, Canada, or his office in said city of Montreal), in the month of July, in the year of our Lord one thousand eight hundred and ninety-three, and whether or no he, the said John Matthews, did have business of any kind with one
9 Moses Davis personally or with the office of said Moses Davis in the city of Montreal, Canada, during the time he, the said John Matthews, was in the city of Montreal, Canada, in the summer of 1893, and whether or no he, the said John Matthews, did have business of any kind with one Moses Davis personally or with the office of said Moses Davis in the city of Montreal, Canada, at any time, and whether or no he, the said John Matthews, did ever see one Moses Davis before the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and ninety-four, and whether or no he, the said John Matthews, did ever see one Moses Davis before he, the said John Matthews, saw the said Moses Davis on the witness stand on the trial of the aforesaid criminal action on the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and ninety-four, and whether or no he, the said John Matthews, did ever in the life of him, the said John Matthews, see the said Moses Davis until he, the said John Matthews, saw him, the said Moses Davis, on the witness stand in room number seventy-three in the United States court and post-office building, in the city of New York, and whether or no he, the said John Matthews, could be mistaken about his, the said John Matthews, ever in the lifetime of him, the said John Matthews, see the said Moses Davis until he, the said John Matthews, saw him, the said Moses Davis, on the witness stand in room number seventy-three in the United States court and post-office building, in the city of New York, on the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and ninety-four.

10 And the jurors aforesaid upon their oath aforesaid do further present that he, the said John Matthews, so being sworn

and having taken his oath as aforesaid on the said seventh day of June, in the said year of our Lord one thousand eight hundred and ninety-four, within the district and circuit aforesaid and within the jurisdiction of this court, upon the said trial of the said issue as aforesaid did falsely, corruptly, knowingly, willfully, and contrary to such oath swear, amongst other things, in substance and to the effect following—that is to say, that he, the said John Matthews, did not have any busines of any kind with one Mr. Davis or his office (meaning Moses Davis, of Montreal, Canada, or his office in said city of Montreal) in the month of July, in the year of our Lord one thousand eight hundred and ninety-three; that he, the said John Matthews, did not have any business of any kind with one Moses Davis personally or with the office of said Moses Davis in the city of Montreal, Canada, during the time he, the said John Matthews, was in the city of Montreal, Canada, in the summer of 1893; that he, the said John Matthews, did not have business of any kind with one Moses Davis personally or with the office of said Moses Davis in the city of Montreal, Canada, at any time; that he, the said John Matthews, did not ever see one Moses Davis before the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and ninety-four; that he, the said John Matthews, did not ever see one Moses Davis before he, the said John Matthews, saw the said Moses Davis on the witness stand on the trial of the aforesaid criminal action on the
11 *the* twenty-fourth day of May, in the year of our Lord one thousand eight hundred and ninety-four; that he, the said John Matthews, did not ever in the life of him, the said John Matthews, see the said Moses Davis until he, the said John Matthews, saw him, the said Moses Davis, on the witness stand in room number seventy-three in the United States court and post-office building, in the city of New York; that he, the said John Matthews, could not be mistaken about his, the said John Matthews, ever in the lifetime of him, the said John Matthews, see the said Moses Davis until he, the said John Matthews, saw him, the said Moses Davis, on the witness stand in room seventy-three in the United States court and post-office building, in the city of New York, on the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and ninety-four, whereas in truth and in fact he, the said John Matthews, did have business with one Mr. Davis and with the office of said Mr. Davis, and whereas in truth and in fact he, the said John Matthews, did have business with one Moses Davis, of Montreal, Canada, and with his (said Moses Davis meaning) office in the said city of Montreal, Canada, in the month of July, in the year of our Lord one thousand eight hundred and ninety-three;

And whereas in truth and in fact he, the said John Matthews, did have business with one Moses Davis personally in the city of Montreal, Canada, during the time he, the said John Matthews, was in the city of Montreal, Canada, in the summer of 1893;

12 And whereas in truth and in fact he, the said John Matthews, did have business with the office of said Moses Davis in the city of Montreal, Canada, during the time he, the said John

Matthews, was in the city of Montreal, Canada, in the month of July, 1893, to wit, on the eleventh day of July, 1893;

And whereas in truth and in fact he, the said John Matthews, did have business with one Moses Davis personally in the city of Montreal, Canada, during the time he, the said John Matthews, was in the city of Montreal, Canada, in the month of July, 1893, to wit, on the twelfth day of July, 1893;

And whereas in truth and in fact he, the said John Matthews, did have business with the office of said Moses Davis in the city of Montreal, Canada, in the month of July, 1893, to wit, on the twelfth day of July, 1893;

And whereas in truth and in fact he, the said John Matthews, did have business with one Moses Davis personally in the city of Montreal, Canada, in the month of July, 1893, to wit, on the thirteenth day of July, 1893;

And whereas in truth and in fact he, the said John Matthews, did have business with the office of said Moses Davis in the city of Montreal, Canada, in the month of July, 1893, to wit, on the thirteenth day of July, 1893;

And whereas in truth and in fact he, the said John Matthews, did see the said Moses Davis before the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and ninety-four;

13 And whereas in truth and in fact he, the said John Matthews, did see the said Moses Davis before he, the said John Matthews, saw the said Moses Davis on the witness stand on the trial of the aforesaid criminal action on the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and ninety-four;

And whereas in truth and in fact he, the said John Matthews, did see the said Moses Davis before he, the said John Matthews, saw the said Moses Davis on the witness stand on the trial of the aforesaid criminal action on the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and ninety-four, to wit, on the eleventh day of July, 1893;

And whereas in truth and in fact he, the said John Matthews, did see the said Moses Davis before he, the said John Matthews, saw the said Moses Davis on the witness stand on the trial of the aforesaid criminal action on the twenty-fourth day of May, A. D. 1894, to wit, on the twelfth day of July, A. D. 1893, at the city of Montreal, Canada;

And whereas in truth and in fact he, the said John Matthews, did see the said Moses Davis before he, the said John Matthews, saw the said Moses Davis on the witness stand on the trial of the aforesaid criminal action on the twenty-fourth day of May, A. D. 1894, to wit, on the thirteenth day of July, A. D. 1893, at the city of Montreal, Canada;

And whereas in truth and in fact he, the said John Matthews, did in the life of him, the said John Matthews, see the said Moses Davis before he, the said John Matthews, saw him, the said Moses Davis, on the witness stand in room number seventy-three in the United States court and post-office building, in the city of New York;

14 And whereas in truth and in fact he, the said John Matthews, did in the life of him, the said John Matthews, see the said Moses Davis before he, the said John Matthews, saw him, the said Moses Davis, on the witness stand in room number seventy-three in the United States court and post-office building, in the city of New York, to wit, on the eleventh day of July, A. D. 1893, at the city of Montreal, Canada;

And whereas in truth and in fact he, the said John Matthews, did in the life of him, the said John Matthews, see the said Moses Davis before he, the said John Matthews, saw him, the said Moses Davis, on the witness stand in room number seventy-three, in the United States court and post-office building, in the city of New York, to wit, on the twelfth day of July, A. D. 1893, at the city of Montreal, Canada;

And whereas in truth and in fact he, the said John Matthews, did in the life of him, the said John Matthews, see the said Moses Davis before he, the said John Matthews, saw him, the said Moses Davis, on the witness stand in room number seventy-three in the United States court and post-office building, in the city of New York, to wit, on the thirteenth day of July, A. D. 1893, at the city of Montreal, Canada;

And whereas in truth and in fact he, the said John Matthews, could be mistaken about his, the said John Matthews, ever in the lifetime of him, the said John Matthews, having seen the said Moses David until he, the said John Matthews, saw him, the said Moses Davis, on the witness stand in room number seventy-three in the United States court and post-office building, in the city of

15 New York, on the twenty-fourth day of May, A. D. 1894;

And whereas in truth and in fact he, the said John Matthews, could be mistaken about his, the said John Matthews, ever in the lifetime of him, the said John Matthews, having seen the said Moses Davis until he, the said John Matthews, saw him, the said Moses Davis, on the witness stand in room number seventy-three in the United States court and post-office building, in the city of New York, on the twenty-fourth day of May, A. D. 1894, whereas in truth and in fact he, the said John Matthews, had in his lifetime seen the said Moses Davis, to wit, on the eleventh day of July, A. D. 1893, at the city of Montreal, Canada;

And whereas in truth and in fact he, the said John Matthews, could be mistaken about his, the said John Matthews, ever in the lifetime of him, the said John Matthews, having seen the said Moses Davis until he, the said John Matthews, saw him, the said Moses Davis, on the witness stand in room number seventy-three, in the United States court and post-office building, in the city of New York, on the 24th day of May, A. D. 1894, whereas in truth and in fact he, the said John Matthews, had in his lifetime seen the said Moses Davis, to wit, on the twelfth day of July, A. D. 1893, at the city of Montreal, Canada;

And whereas in truth and in fact he, the said John Matthews, could be mistaken about his, the said John Matthews, ever in the lifetime of him, the said John Matthews, having seen the said Moses

Davis until he, the said John Matthews, saw him, the said Moses Davis, on the witness stand in room number seventy-three
16 in the United States court and post-office building, in the city of New York, on the 24th day of May, A. D. 1894, whereas in truth and in fact he, the said John Matthews, had in his lifetime seen the said Moses Davis, to wit, on the thirteenth day of July, A. D. 1893, at the city of Montreal, Canada.

And the jurors aforesaid upon their oath aforesaid do further present that at the time when and the place where he, the said John Matthews, did testify and give evidence as aforesaid that he, the said John Matthews, did not have any business of any kind with one Moses Davis or his office (meaning Moses Davis, of Montreal, Canada, or his office in said city of Montreal) in the month of July, in the year of our Lord one thousand eight hundred and ninety-three; that he, the said John Matthews, did not have any business of any kind with one Moses Davis personally or with the office of said Moses Davis in the city of Montreal, Canada, during the time he, the said John Matthews, was in the city of Montreal, Canada, in the summer of 1893; that he, the said John Matthews, did not have business of any kind with one Moses Davis personally or with the office of said Moses Davis in the city of Montreal, Canada, at any time; that he, the said John Matthews, did not ever see one Moses Davis before the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and ninety-four; that he, the said John Matthews, did not ever see one Moses Davis before he, the said John Matthews, saw the said Moses Davis on the witness stand on the trial of the aforesaid criminal action on the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and ninety-
17 four; that he, the said John Matthews, did not ever in the life of him, the said John Matthews, see the said Moses Davis until he, the said John Matthews, saw him, the said Moses Davis, on the witness stand in room number seventy-three in the United States court and post-office building, in the city of New York; that he, the said John Matthews, could not be mistaken about his, the said John Matthews, ever in the lifetime of him, the said John Matthews, see the said Moses Davis until he, the said John Matthews, saw him, the said Moses Davis, on the witness stand in room number seventy-three in the United States court and post-office building, in the city of New York, on the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and ninety-four; he, the said John Matthews, did not believe to be true that he, the said John Matthews, did not have any business of any kind with one Moses Davis or his office (meaning Moses Davis, of Montreal, Canada, or his office in said city of Montreal) in the month of July, in the year of our Lord one thousand eight hundred and ninety-three; that he, the said John Matthews, did not have any business of any kind with one Moses Davis personally or with the office of the said Moses Davis in the city of Montreal, Canada, during the time he, the said John Matthews, was in the city of Montreal, Canada, in the summer of 1893, or that he, the said John Matthews, did not have business of any kind with one Moses Davis personally or

with the office of said Moses Davis in the city of Montreal, Canada, at any time, or that he, the said John Matthews, did not ever
18 see one Moses Davis before the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and ninety-four, or that he, the said John Matthews, did not ever see one Moses Davis before he, the said John Matthews, saw the said Moses Davis on the witness stand on the trial of the aforesaid criminal action on the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and ninety-four, or that he, the said John Matthews, did not ever in the life of him, the said John Matthews, see the said Moses Davis until he, the said John Matthews, saw him, the said Moses Davis, on the witness stand in room number seventy-three in the United States court and post-office building, in the city of New York, or that he, the said John Matthews, could not be mistaken about his, the said John Matthews, ever in the lifetime of him, the said John Matthews, see the said Moses Davis until he, the said John Matthews, saw him, the said Moses Davis, on the witness stand in room number seventy-three in the United States court and post-office building, in the city of New York, on the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and ninety-four, and so the jurors aforesaid upon their oath aforesaid do say that the said John Matthews on the said seventh day of June, in the year of our Lord one thousand eight hundred and ninety-four, within the southern district of New York and within the jurisdiction of this court, in manner and form as aforesaid, having taken an oath before a competent tribunal in a case wherein a law of the said United States authorized an oath to be administered that he would truly depose and testify, will-
19 fully and contrary to his said oath, did depose and state material matters which he, the said John Matthews, did not then believe to be true, and thereby did commit willful and corrupt perjury, against the peace of the United States and their dignity and contrary to the statute of the said United States in such case made and provided.

HENRY C. PLATT,
U. S. Attorney.

(Endorsed:) U. S. circuit court. The United States of America *vs.* John Matthews. Indictment, perjury. U. S. Rev. St., sec. 5392. Henry C. Platt, U. S. district attorney. A true bill. Walter Cook, foreman. Filed in open court the 19th June, 1894. June 20, 1894, the defendant arraigned and indct. read. Def't pleads not guilty. June 27, '94, with leave, etc., by 27th, leave to withdraw, etc., extra week. Jan'y 15, 1895, the defendant tried. Verdict, guilty. Jan'y 15, '95, remanded for sentence. April 25, 1895, sentence, three (3) years and six (6) months imprisonment, term of imprisonment to run concurrently with sentence heretofore imposed upon defendant as of January 29, 1895. (See Docket B, No. 1892.) Sentence to be executed at Kings County penitentiary. U. S. circuit court. Filed Jun- 19, 1894. John A. Shields, clerk.

20 TUESDAY, *January 15th*, 1895.

The court meets and is opened by proclamation.
Present: Hon. Addison Brown, judge.

THE UNITED STATES
vs.
JOHN MATTHEWS. } Sec. 5392. Perjury.

On motion of U. S. attorney, ordered trial; defendant present.
Jurors sworn: Charles J. Berg, Charles H. Trent, Augustus H. Whiting, Charles Schneider, Thomas T. Sturges, Clayton Platt, William Seggie, Henry G. Allen, Gustavus Rice, Andrew P. Nahmens, John Early, Oscar E. Ballin.
Mr. John O. Mott, assistant U. S. attorney, opens cause in behalf of the prosecution.

Evidence for Prosecution.

Henry I. Thornton sworn.
Frank D. Curtis "
William P. Cherry "
Mr. Mott reads from transcript of stenographer's notes testimony taken on trial of cause of United States *vs.* John Matthews, impleaded, etc.

21 *Evidence for Prosecution Resumed.*

Moses Davis sworn.
Eddie John Talbot sworn.
Mr. Charles A. Hess, of counsel for defendant, moves the court to dismiss indictment, and is heard in support of motion; John O. Mott, ass't U. S. att'y, opposed.
Motion denied. Exception. (See stenographer's notes.)
Mr. Hess sums up cause on part of defendant.
Mr. Mott sums up cause on part of prosecution.
Charge is thereupon given by the court to the jury, who retire in charge of an officer duly qualified to attend them, and on their return they say that they find the defendant guilty of the charges in the indictment contained, and so say they all.
(Motion in arrest of judgment to be submitted on briefs by counsel.)

22 United States Circuit Court, Southern District of New York.

THE UNITED STATES
vs.
JOHN MATTHEWS.

Indictment for perjury; variance; motion to set aside verdict.

Wallace Macfarlane, U. S. dist. att'y, and John O. Mott, ass't U. S. att'y, for United States.

Hess, Townsend & McClelland, for the defendant.

BROWN, *J.:*

The defendant was indicted for perjury in his testimony as a witness on a previous trial. The indictment, after properly setting forth the court and the trial, with time and place, states that the defendant, to wit, on the 7th day of June, 1894, appeared as a witness in his own behalf, and, being sworn, gave material testimony, which the indictment alleges was false. On the present trial it appeared that the former trial continued during several days, and that the accused was sworn as a witness on the 6th day of June, and testified on that day and also upon the 7th, but that the testimony alleged to be false was given upon the 6th and not on the 7th, as stated in the indictment. The question as to a fatal variance being reserved, the jury found the defendant guilty.

23 Numerous authorities have been cited in support of the motion to set aside the verdict on the ground of a fatal variance. I do not find those cases precisely applicable. Where the indictment alleges the perjury to have been committed in some matter of record or in a deposition or affidavit of a certain specified date, and the record or other writing *or* being produced, as in such cases it must be produced, shows a different date from that alleged in the indictment, the variance is fatal because the date of the record is a material part of its identity; but where the perjury is not alleged by the indictment to be upon any matter of record or other written document, and no written document is necessary for proof of the offense, I do not find that the day assigned in the indictment, when stated under a *videlicet*, as in this case, is deemed material, or that the rule as respects perjury is different from the rule relating to indictments for other crimes.

In the present case the perjury charged was in the defendant's testimony in a specified cause and at a time and place sufficiently identified to prevent any possibility of mistake or surprise as to the offense intended to be charged. The charge of perjury was not founded upon any record or written instrument. The indictment does not refer to any record or other writing, and no record or other writing was necessary for the proof of the offense. The stenographer who took notes of the former trial was indeed sworn as a witness, produced his original stenographic notes of the testimony, swore to their correctness and to the true date of the defendant's testi-

24 mony; but such notes do not form a part of the record of the trial, though a transcript of them may be made such for

special purposes. The indictment made no reference to them, and their use was but one of the forms of oral proof, and the transcript originally made stated the same date as the indictment. In such cases proof of the precise day as stated under a *videlicet* in the indictment seems not to be material. Rex *vs.* Coppard, 3 C. & P., 59; 3 Russ. on Crimes, p. 41, note G; 2 Wharton Crim. Law, sec. 1291; Keator *vs.* The People, 32 Mich., 484, 487; Wood *vs.* The People, Hun., 381, 384; People *vs.* Hoag, 2 Parker Cr. Rep., 1.

The motion must therefore be denied.

Dated New York, March 20, 1895.

(Endorsed:) U. S. circuit court, south. dist. N. Y. United States *vs.* John Matthews. Opinion, Brown, J. U. S. circuit court. Filed Mar. 20, 1895. John A. Shields, clerk.

25 At a stated term of the United States circuit court held at the court-room in the United States circuit court-house and post-office building for the second circuit, in the city of New York, on the 20th day of March, 1895.

Present: Hon Addison Brown, judge.

THE UNITED STATES OF AMERICA *vs.* JOHN MATTHEWS. } Order Denying Motion for a New Trial and in Arrest of Judgment.

After hearing Charles A. Hess, Esq., for the motion for a new trial and in arrest of judgment in the above-entitled action, on behalf of the said motion, and Wallace Macfarlane, Esq., U. S. attorney, in opposition thereto, and the court having duly considered the same—

It is ordered that the said motion for a new trial and the *same* motion in arrest of judgment in the above action be, and the same are hereby, denied.

It is further ordered that this order be entered *nunc pro tunc* as and of the 20th day of March, 1895.

ADDISON BROWN.

(Endorsed:) U. S. circuit court, southern district of New York. United States *versus* John Matthews. Order denying notice for new trial, &c. Hess, Townsend & McClelland, 40 Wall St., attorneys for def't. U. S. circuit court. Filed Oct. 2, 1895. John A. Shields, clerk.

26 THURSDAY, *April 25th*, 1895.

Present: Hon. Addison Brown, judge.

THE UNITED STATES *vs.* JOHN MATTHEWS. } Sec. 5392. Perjury.

On motion of U. S. attorney, ordered sentence.

The court thereupon proceeds to pass judgment, and sentence the prisoner, John Matthews, to be imprisoned for a period of three

(3) years and six (6) months, the term of said imprisonment to run concurrently with term of imprisonment under sentence of two (2) years imposed by the court on January 29th, 1895.

Sentence to be executed at the Kings County penitentiary.

27 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA
against
JOHN MATTHEWS.

Proposed Bill of Exceptions in Case Number 2.

Indictment for perjury.

The defendant above named was indicted at a term of the United States circuit court for the southern district of New York for a violation of section 5392 of the Revised Statutes of the United States.

The indictment is as follows:

The defendant was arraigned on the 20th day of June, 1894, and pleaded not guilty.

And afterwards, to wit, on the 18th day of January, 1895, the issue aforesaid joined on said indictment by said plea of not guilty came on duly to be tried before Honorable Addison Brown and a jury.

The United States was represented by John O. Mott, Esq., assistant United States attorney, and the defendant was represented by his counsel, Charles A. Hess.

In the course of the trial, and before the rendering of the verdict therein, the counsel for defendant did take and allege sundry exceptions to the rulings and charge of the court; which exceptions
28 are hereinafter set forth,

To maintain the said issues on the part of the United States, counsel for the prosecution called as a witness HENRY I. THORNTON, who, being duly sworn, testified on behalf of the Government, upon his direct examination, as follows:

I am a clerk attached to the criminal part of the United States circuit court, and was such on the 24th of May last. The minutes show that there was a circuit court held in this place on the 24th day of May. I kept the minutes. Honorable Charles L. Benedict presided at that trial. The case of The United States against John Matthews, impleaded with Thomas E. Jones and William E. Todd, was commenced at that time. That is the indictment on which the trial was had.

Indictment offered in evidence, marked Exhibit A.

The trial commenced on the 24th of May and was adjourned from the 24th of May to Monday, the 28th. The trial was resumed on the 29th and 31st, and resumed on the 4th of June, 5th of June, 6th of June, and was concluded on the 7th of June. There was a verdict rendered by the jury. The verdict was guilty of the charges in the

second count of the indictment contained and not guilty of the charges in the first. The defendant Matthews was sworn on the trial. The minutes show that he was sworn on the 5th of June. I don't recollect that there was any specific direction about swearing him. He was sworn as a witness in the case by me.

Q. You were at that time clerk of the court?

29 Objected to by counsel for defendant as incompetent, improper, and not the best evidence.

Objection overruled. Exception by defendant's counsel.

A. I presume so.

The defendant was called as a witness by the court.

The defendant was called as a witness by the defendant.

By the DISTRICT ATTORNEY: The minutes show that he was the second witness called for the defendant. He was sworn. I swore him. I know what oath was administered. I said, You solemnly swear that your evidence to the court and jury in this issue of traverse between The United States of America and John Matthews, impleaded with Thomas E. Jones and William E. Todd, shall be the truth, the whole truth, and nothing but the truth, so help you God. This was in the presence of the judge and during the trial.

Cross-examination by Mr. HESS:

The defendant was sworn by the oath that I have just given. The oath that I have just repeated is that which is usually administered to a witness who swears on the Testament or the Bible and was the oath that I administered to Matthews. I think he was sworn on the Bible, although I won't swear to it. Matthews was called as a witness in his own behalf on Tuesday, the 5th of June. I cannot say whether he was on the witness stand the most of that day. There was a witness who followed him. The minutes show another witness followed him on that day. He was again called as a witness on the 6th of June by the defendant's attorney.

30 It appears by my minutes that he was recalled on the 6th of June. There were witnesses called and sworn who testified after the defendant on the 6th of June, according to my minutes. They were witnesses called for the defendant. There were others called who testified in rebuttal on the same day, June 6th. The minutes show what witnesses were called in rebuttal by the Government. Witnesses were called in rebuttal on the 6th of June. The minutes show that on the 7th of June there was evidence for the defendant in rebuttal. There were witnesses called in rebuttal for the Government on the 6th of June. My minutes show that they were called in rebuttal. There was testimony in rebuttal for the prosecution on the 6th of June. My minutes show that. A witness could not very well be called in rebuttal for the prosecution until after the defendants had rested. My best recollection is that the defense rested on the 6th of June, before the witnesses in rebuttal were called for the prosecution. Thaddeus B. Wakeman was called

as a witness in rebuttal on the 6th of June. He testified for the Government on that day. So did Louisa Anderson and Samuel Nicholas testify on that day. My minutes show an entry on the 7th that evidence for prosecution in rebuttal was taken and continued on that day. On that day there was called in rebuttal by the Government Eddy John Talbot, William P. Cherry, J. C. Cummings, Edward Stagenden, and Francis C. Pitt. Following the entry showing that, there is an entry which reads, Evidence for defendant in rebuttal. According to my minutes, defendant called in rebuttal John Matthews and Arthur J. Snow. They were called on the 7th of June.

31 The case went to the jury that night, and a verdict of guilty was rendered that night on the second count and not guilty as to the first count. My minutes show that Matthews was called in his own behalf on the 5th of June. His examination was continued on the 6th and was closed on that day, and my minutes show that on the 7th of June he was called in rebuttal. His direct examination was ended on the 6th. My minutes show that he was first sworn on the 5th of June, and his testimony for the defense was continued on the 6th—that is, he was recalled on the 6th, according my minutes, and after that he was called in rebuttal on the 7th of June, so my minutes state.

It is stipulated in the presence of the court that a transcript of the testimony of the former trial may be read in evidence.

Counsel for defendant, however, states that he does not want to be bound by the dates that appear on Mr. Mott's copy of the stenographer's notes of the time when testimony was given.

The COURT: That may be aside from proving the record. They are simply admitted as the general notes of the trial. Either side may prove any specific mistakes and prove corrections. The United States, as a part of the Government's case and to prove the record of the former trial, offers in evidence the transcript of the stenographer's minutes, which were marked B 1, B 2, B 3, B 4, B 5, B 6, B 7, B 8.

Mr. Cherry, the stenographer, was then called by order of the court to prove the dates.

32 WILLIAM P. CHERRY, called as a witness, being duly sworn, testifies as follows:

I was the stenographer on the former trial of The United States against Matthews. Exhibits B 6, B 7, and B 8 are a portion of the notes which I took on the former trial. I am of the impression that I took all of the testimony embraced in Exhibit B 6. I took the first portion of testimony embraced in Exhibit B 7, at what pages I cannot say. In Exhibit B 7 I think I took the testimony of John Matthews and Edward Frossard. I took all of Matthews' testimony in Exhibit B 7. Exhibit B 6 is the testimony taken on June 5th and is all the testimony that was taken on that day. Exhibit B 7 contains all the testimony taken on June 6, 1894. The dates on Exhibit B 7, June 7, 1894, both on the cover and on the first page

of the testimony, are error; that testimony was taken on June 6th. The testimony that I took at Exhibit B 8 was taken June 7, 1894, and contains all the testimony taken on that day. The pamphlet produced, B 7, states all the testimony and the order in which it was given on the trial, June 6th, 1894.

Mr. MOTT: Now I read, with the permission of the court, the part of the evidence which is charged as the perjury of this defendant, commencing at page 550, at the bottom of the page, which is pamphlet B 7.

Direct examination by counsel for defendant:

Q. Do you know Mr. Davis?
A. Do you mean the gentleman that testified here?
Q. Yes.
A. No, sir.
Q. Did you ever see him to your knowledge before he appeared in court and testified?
A. Never in my life.
33 Q. Were you in Montreal last summer?
A. Yes, sir.
Q. About when?
A. To the best of my recollection, it was either at the end of July or the commencement of August.
Q. Can you tell about when you were there by fixing the time of your departure from New York? Is that the time you went on your vacation?
A. No. My purpose in leaving then was on account of my wife.
Q. About when did you leave here? Where did you go?

The COURT: How is that important? The only question is whether he was there when Davis says he was there.

Mr. HESS: I am going to try and have this witness fix where he was on the 13th of July, the date that Davis gives.

The COURT: You may do that.

Q. Will you please tell us just where you went and when you left New York or about when you left New York?
A. I don't remember the exact date I left New York.
Q. About when?
A. I think it was about a week or ten days after the 4th of July.
Q. That would be between the 12th and 14th?
A. Yes, sir; somewhere about that date.
Q. Where did you go from New York?
A. The Catskill mountains.
Q. What part of the mountains?
A. To the Kaaterskill house.
Q. How long did you remain there?
A. It was two days.
Q. Who was with you?
A. My wife.
Q. Any one else?

A. Mrs. Jones.

34 Q. Mrs. Jones and your wife were intimate friends, were they not?

A. Yes, sir.

Q. And you and Jones were quite intimate?

A. Yes, sir.

Q. You remained two days at the Kaaterskill house, and from there where did you go?

A. From there we went to Albany.

Q. How long did you remain in Albany?

A. I think about a day.

Q. Where did you go from there?

A. Buffalo.

Q. How long did you remain in Buffalo?

A. A day.

Q. From Buffalo where did you go?

A. Niagara Falls.

Q. How long did you remain there?

A. Four or five days.

Q. From Niagara Falls where did you go?

A. Clayton.

Q. On the St. Lawrence—the Thousand islands?

A. Yes, sir.

Q. How long did you remain there?

A. Part of a day.

Q. Part of the day you arrived there?

A. Yes, sir.

By the COURT:

Q. Was your wife with you all this time?

A. Yes, sir.

Q. And Mrs. Jones?

A. And Mrs. Jones.

By Mr. HESS:

Q. From there where did you go?

A. Montreal.

Q. You went down the river to Montreal?

A. Yes, sir.

Q. And you got to Montreal in the evening?

A. We got to Montreal, I think, about eight o'clock in the evening.

Q. How long did you remain in Montreal?

A. I think five or six days.

Q. Where did you stop in Montreal?

A. The Windsor hotel.

Q. Did you register?

A. Yes, sir.

35 Q. How did you register?

A. My proper name.

Q. How did you register?

A. John Matthews and wife.
Q. Did you ever assume the name of George Carter?
A. No, sir.
Q. Did you ever go by the name of George Carter?
A. No.
Q. Did you ever sign any letters or communications of any kind under that name?
A. No, sir.
Q. Or authorize any one to?
A. No, sir.
Q. Did you have business of any kind with Mr. Davis or his office?
A. No, sir.
Q. During the time you were in Montreal?
A. No, sir; nor at any other time.
Q. Do you remember having seen Davis at that time or at any other time?
A. I never saw Mr. Davis in my life until I saw him on this witness stand.
Q. You cannot be mistaken about that?
A. I am positive on that point.

It appears from the record that the foregoing testimony was given and taken on June 6th, 1895.

MOSES DAVIS was then called as a witness in behalf of the prosecution, and, being duly sworn, testified as follows:

I have resided in Montreal since 1862. I know Matthews by sight; I met him in July, 1893, for the first time, in my office, in Montreal. Since 1875 I have been custom-house broker and shipping agent. In July, 1893, I had business transactions with Mr. Matthews—about the 11th or 12th of July.
Q. What was the transaction?

Objected to by Mr. Hess as immaterial, incompetent, and
36 improper. If the purpose of this testimony is to show what Matthews testified to on the former trial is false, the district attorney must call the attention of the witness to that particular portion of Matthews' testimony which he claims was false and which he desires now to prove was false.
The COURT: It is necessary to prove that the statement is untrue; therefore I think all circumstances in reference to it must be received.
Objection overruled. Exception by defendant's counsel.

A. The shipping of some goods to Germany.
No one introduced him to me. He introduced himself, in my office, No. 9 Carman street, Montreal, as Mr. Carter. He produced some bills of lading and said he wanted to have those goods shipped to Germany. We went to the Grand Trunk railway and delivered up the bills of lading and got the freight accounts. We drove there together in my buggy. The Grand Trunk Railway depot

from my office is, perhaps, one-half or three-quarters of a mile. When we got there we found Mr. Talbot, who is here in court, to whom we delivered the bills of lading, and he gave us the freight accounts. The papers that the defendant gave me I took and handed them to Mr. Talbot, and he gave me the freight account. After that was done we drove back to my office together. After we got there I took instructions as to the mode of shipping the goods and the defendant left. He gave me the instructions, but on what goods I don't remember; I can't tell without the bills of lading; I can't remember. As far as I recollect, there were fifty-eight—
37 I am not positive; that is my best recollection—and they were shipped and I paid the freight. Mr. Matthews paid me afterwards; I think the next day or day after; I am not sure. He paid me in cash in my office. I was down here on the trial and I am the Moses Davis who gave testimony in that case. This defendant is the same man that I saw at the former trial, the same man I had the dealings with in Montreal about the 11th or 12th of July, 1893.

EDDY JOHN TALBOT, a witness called in behalf of the Government, being duly sworn, testified:

I am a railway clerk connected with the Grand Trunk railway, at Montreal. I know Mr. Davis and I gave seen this defendant. I saw him in Montreal in my office in July, 1893, at the office of the Grand Trunk railway. Mr. Davis came with him—Mr. Davis who is here now. They were in the office fifteen or twenty minutes. Their business was the surrendering up of bills of lading and getting advice notes, what you sometimes call expense bills. There were a number of packages; I could not say exactly. He was never there but that one time that I know of with Mr. Davis. Mr. Davis brought bills of lading with him dated New York, some of them; some were goods that came over the Grand Trunk railway by the Merchants' Despatch.

Cross-examination by defendant's counsel:

I saw the defendant in the office about fifteen or twenty minutes, I think. I did not see him constantly during that time. I had other work to attend to besides looking at the man. I suppose I saw him two or three minutes. I never saw him before that time or since. I saw him here at the former trial last summer.
38 The time that I speak of when I first saw him was either the 12th or 13th of July.

Redirect by U. S. attorney:

I recognized the gentleman first of all when the customs officers produced a photograph of him, but I was not then positive of the man. I was not positive, though I picked him out as the party. The photograph, I think, was produced by Mr. Cummings, the special agent. They had a photograph of a party of four or five

and I picked him out. I was ordered to come down here by the superintendent. I was requested to bring down the register of the Hotel Windsor for 1893.

The COURT: Was that an exhibit in the former trial?

Mr. MOTT: Yes, sir.

The COURT: If you will identify it I will let you read it.

Mr. MOTT: I will identify it by Mr. Cummings when he comes.

The COURT: Was it marked as an exhibit in the trial?

Mr. MOTT: I don't know.

The COURT: The place where it was offered in the minutes should show.

Mr. MOTT, proceeding to read at page 639——

Mr. HESS: I object to the district attorney reading from the book of the evidence of the former trial at this time for the reason that the book is not now in evidence.

Objection overruled. Exception by defendant's counsel.

39 Mr. MOTT, reading at page 639 of the record of the former trial:

"J. C. Cummings recalled by Mr. Mott. Q. Look at that book. Did you ever see that book before? A. I did. Q. Will you examine the register of July 11? Do you know what book that is? A. It is a register of the Windsor hotel, Montreal, Canada. Q. Did you ever examine it before? A. I have. Q. Where? A. At the Windsor hotel, in Montreal. Q. Do you find the defendant's name on there under date of July 11? A. I find here, as occupying room 406, John Matthews and wife, New York; room 408, Mrs. Jones. By the court: Q. What date? A. July 11, 1893. By Mr. Mott: Q. Do you know that handwriting? A. I know it by the examination of papers; that is all. Mr. Hess: We will admit it is in his *his* handwriting and we offer the book if the Government don't want to offer it. Mr. Mott: I want to prove it first. I offer the book in evidence."

It was admitted that the book just read from was in evidence on the former trial.

The Government rests.

Counsel for defendant then asked the court to direct the jury to acquit upon two grounds:

First, upon the ground that it does not appear from the indictment in this case that any of the allegations as to which and on which this prosecution for perjury is predicated was material in the trial of the issue on the indictment for conspiracy.

Second, that there is a fatal variance between the proof in this case and the indictment, in this, that the indictment

40 charges the alleged perjury to have been committed on June 7, 1894, when the record shows that the testimony on which the present indictment for perjury is predicated was given and was testified to by the defendant on June 6, 1894.

Each of the foregoing motions to direct an acquittal were denied

by the court, to which refusals and each of them counsel for the defendant duly excepted.

The court then proceeded to charge the jury, and at the conclusion of the charge defendant's counsel asked the court to instruct the jury that if they find from the evidence that the alleged perjury as charged in the indictment was committed on the 6th of June, 1894, instead of the 7th of June, 1894, as alleged in the indictment, they must acquit.

This the court declined to do and gave defendant's counsel an exception.

The jury retired and returned with a verdict of guilty.

And forasmuch as none of the said matters and exceptions so offered and made to the rulings and directions of said judge do appear upon the records of said case, therefore, upon the prayer of said defendant by counsel, the said judge has signed and sealed this bill of exceptions *nunc pro tunc* as of the 15th day of January, 1895.

ADDISON BROWN.

(Endorsed:) U. S. circuit court, southern district of New York. United States, appellee, against John Matthews, appellant.
41 Bill of exceptions. Hess, Townsend & McClelland, attorneys for def't, 40 & 42 Wall street, New York city. U. S. circuit court. Filed Apr. 25, 1895. John A. Shields, clerk.

42 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA
against
JOHN MATTHEWS.

Assignment of Errors.

Afterwards, to wit, on the 25th day of April, 1895, comes John Matthews, by Hess, Townsend and McClelland, his attorneys, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

I.

That the objection by counsel for the defendant to the question "You were at that time clerk of the court?" should have been sustained, and the court erred in overruling said objection.

II.

That the objection made by defendant's counsel to the question "What was the transaction?" was improperly overruled by the court, and said objection so made should have been sustained, and the court erred in admitting the question under the objection so made by defendant's counsel.

III.

The court erred in allowing the district attorney to read in
43 evidence from a book which was at the time not in evidence in the case, and overruling the objection made by defendant's counsel thereto.

IV.

The court erred in not directing the jury to acquit upon the grounds assigned—first, that it does not appear from the indictment in this case that any of the allegations as to which and on which this prosecution for perjury is predicated was material in the trial of the issue on the indictment for conspiracy; second, that there is a fatal variance between the proof in this case and the indictment in this, that the indictment charges the alleged perjury to have been committed on June 7, 1894, when the record shows that the testimony on which the present indictment for perjury is predicated was given and was testified to by the defendant on June 6 1894.

V.

The court erred in declining the request of defendant's counsel to instruct the jury that "If they find from the evidence that the alleged perjury as charged in the indictment was committed on the 6th of June, 1894, instead of the 7th of June, as alleged in the indictment, they must acquit."

Dated New York, April 25th, 1895.

HESS, TOWNSEND & McCLELLAND,
Attorneys for Defendant, 40 & 42 *Wall St., New York City.*

CHARLES A. HESS, *Of Counsel.*

44 (Endorsed:) U. S. circuit court, southern district of New York. United States, appellee, against John Matthews, appellant. Assignment of errors. Hess, Townsend & McClelland, attorneys for def't, 40 & 42 Wall street, New York city. U. S. circuit court. Filed Apr. 25, 1895. John A. Shields, clerk.

45 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA
against
JOHN MATTHEWS.

The above-named defendant, John Matthews, conceiving himself aggrieved by the judgment of this court entered in above-entitled cause on the 25th day of April, 1895, does hereby appeal from said judgment of the circuit court of the United States, and prays that this appeal may be allowed, and that a transcript of the record and

proceedings upon which said judgment was entered, duly authenticated, may be sent to the Supreme Court of the United States.

Dated New York, April 25th, 1895.

HESS, TOWNSEND & McCLELLAND,
Attorneys for Defendant, 40 & 42 Wall Street, New York City.

CHAS. A. HESS, *Of Counsel.*

And now, to wit, on the 25th day of April, 1895, it is ordered that appeal be allowed as prayed for.

ADDISON BROWN,
United States District Judge.

(Endorsed:) U. S. circuit court, southern district of New York. United States against John Matthews. Notice of appeal and
46 allowance. Hess, Townsend & McClelland, attorneys for def't, 40 & 42 Wall street, New York city. A copy of the within paper has been this day received at this office. Apr. 25, 1895. Wallace Macfarlane, U. S. attorney. U. S. circuit court. Filed Apr. 25, 1895. John A. Shields, clerk.

47 At a stated term of the circuit court of the United States held at the United States court and post-office building, in the city of New York, on the 25th day of April, 1895.

Present: Honorable Addison Brown, judge.

JOHN MATTHEWS, Appellant,
ads.
UNITED STATES OF AMERICA, Appellee.

On all the papers and proceedings herein and heretofore had herein, it is—

Ordered that the indictment and all the proceedings had thereon and all other proceedings herein be sent up to the Supreme Court of the United States by the clerk of this court on or before the 25th day of May, 1895, and that said day hereby is made the return day of the appeal allowed herein.

ADDISON BROWN,
United States District Judge.

(Endorsed:) U. S. circuit court, southern district of New York. United States, appellee, against John Matthews, appellant. Order for return. Hess, Townsend & McClelland, attorneys for def't, 40 & 42 Wall street, New York city. U. S. circuit court. Filed Apr. 27, 1895. John A. Shields, clerk.

48 At a stated term of the circuit court of the United States for the southern district of New York, held at the United States court and post-office building, in the city of New York, on the 25th day of April, 1895.

Present: Honorable Addison Brown, circuit judge.

JOHN MATTHEWS, Appellant,
ads.
UNITED STATES OF AMERICA, Appellee.

On the application of John Matthews therefor, and after hearing Charles A. Hess, his counsel, it is—

Ordered that, pending the appeal to the Supreme Court of the United States, John Matthews herein may be, and he hereby is, remanded to the custody of the marshal for the southern district of New York; that he be released on bail by said marshal by giving bail in the sum of seventy-five hundred dollars to obey the mandate or direction of court upon the entry of judgment upon the decision of the Supreme Court on said appeal; and it is further—

Ordered that the said appeal as allowed herein shall operate as a supersedeas, and that until the further order of this court on the mandate of the Supreme Court that all proceedings of this court and of the United States marshal be, and they are hereby, stayed.

ADDISON BROWN.

49 (Endorsed:) U. S. circuit court, southern district of New York, John Matthews, appellant, *ads.* United States, appellee. Supersedeas. Hess, Townsend & McClelland, attorneys for appellant, 40 & 42 Wall street, New York city. A copy of the within paper has been this day received at this office, Apr. 25, 1895. Wallace Macfarlane, U. S. attorney. U. S. circuit court. Filed Apr. 25, 1895. John A. Shields, clerk.

50 Circuit Court of the United States, Southern District of New York, Second Circuit.

JOHN MATTHEWS, Appellant,
ads.
UNITED STATES OF AMERICA, Appellee.

Know all men by these presents that we, John Matthews, residing at Bloomfield Mills, New Jersey, and Emil Schwab, residing at number 1545 Madison avenue, New York city, are held and firmly bound to the United States of America and to John H. McCarty, individually and as marshal of the United States for the southern district of New York, in the sum of five hundred (500) dollars, to be paid to the said United States of America and to John H. McCarthy, individually and as marshal of the United States for the southern district of New York; for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the 25th day of April, in the year one thousand eight hundred and ninety-five.

Whereas the above-named John Matthews has prosecuted an appeal to the Supreme Court of the United States to reverse the judg-

ment rendered in the above-entitled action by the circuit
51 court of the United States for the southern district of New York, entered on the 25th day of April, 1895:

Now, therefore, the condition of this obligation is such that if the above-named John Matthews shall prosecute said appeal to effect and answer all damages and costs if he fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN MATTHEWS. [SEAL.]
EMIL SCHWAB. [SEAL.]

Sealed and delivered and taken and acknowledged this 25th day of April, 1895, before me as to John Matthews.

Sealed and delivered and taken and acknowledged this 26th day of April, 1895, before me as to Emil Schwab.

JOHN A. SHIELDS,
United States Commissioner.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Emil Schwab, being duly sworn, deposes and says that he resides at number 1545 Madison avenue, New York, in said district, and that he is a freeholder therein and is worth the sum of one thousand dollars over and above all his just debts and liabilities.

EMIL SCHWAB.

Sworn to before me this 26th day of April, 1895.

JOHN A. SHIELDS,
United States Commissioner.

52 (Endorsed:) U. S. circuit court, southern district of New York. John Matthews, appellant, *ads.* United States, appellee. Bond. Hess, Townsend, & McClelland, attorneys for appellant, 40 & 42 Wall street, New York city. Approved April 26, 1895. Addison Brown, U. S. D. J., U. S. circuit court. Filed Apr. 26, 1895. John A. Shields, clerk.

53 UNITED STATES OF AMERICA, *ss:*

To the United States of America and John H. McCarthy, individually and as marshal of the United States for the southern district of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, on the 25th day of May, 1895, pursuant to an appeal taken, allowed, and filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein John Matthews is appellant and The United States of America is respondent, to show cause, if any there be, why the error in the said

appeal mentioned should not be remedied and speedy justice should not be done to the parties in that behalf.

Dated New York, April 25th, 1895.

ADDISON BROWN,
United States District Judge.

54 [Endorsed:] E. & A. B., 1347. U. S. circuit court, southern district of New York. United States, appellee, against John Matthews, appellant. Original. Citation. Hess, Townsend & McClelland, attorneys for def't, 40 & 42 Wall street, New York city. A copy of the within paper has been this day received at this office, Apr. 25, 1895. Wallace Macfarlane, U. S. attorney. S. Due and timely service of a copy of the within citation is admitted this 25th day of April, 1895. ——, U. S. att'y.

[Stamped:] U. S. circuit court. Filed Apr. 25, 1895. John A. Shields, clerk.

Endorsed on cover: Case No. 16,068. S. New York C. C. U. S. Term No., 778. John Matthews, plaintiff in error and appellant, *vs.* The United States. Filed October 15th, 1895.

FILED.
FEB 21 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

October Term, 1895.

No. 778.

JOHN MATHEWS,
Plaintiff in Error and Appellant,

vs.

THE UNITED STATES.

BRIEF FOR THE PLAINTIFF IN ERROR AND APPELLANT.

HESS, TOWNSEND & McCLELLAND,
Attorneys for Plaintiff in Error.

W. J. TOWNSEND,
Of Counsel.

Supreme Court of the United States.

JOHN MATTHEWS,
Plaintiff in Error and Appellant,

against

THE UNITED STATES.

No. 778.

BRIEF AND POINTS FOR PLAINTIFF IN ERROR.

Statement.

This is an appeal from the judgment of the Circuit Court of the United States for the Southern District of New York, entered April 25, 1895, and from the order denying a motion in arrest of judgment. The facts are as follows:

First.—The indictment was for perjury and its material allegations, so far as the present case is concerned, were as follows:

> (*a.*) That on the 24th day of May, 1894, there came on to be tried at the Circuit Court of the United States for the Southern District of New York, a certain issue between the United States and this appellant, impleaded with others, upon a certain criminal indictment (p. 3).

(*b.*) That at the trial of said issue, to wit, on the 7th day of June, 1894, the said John Matthews appeared as a witness in his own behalf, and was then and there duly sworn (p. 5).

(*c.*) That on the said 7th day of June, 1894, he gave the testimony alleged to be false (p. 5).

The proof was as follows :

(*a.*) The trial of the indictment upon which the alleged false testimony was given, commenced on the 24th day of May, 1894, as alleged in the indictment (p. 14).

(*b.*) The defendant John Matthews was sworn on the 5th day of June and gave testimony on that day (p. 15), and was followed by another witness upon the same day. There were also witnesses called by the Government in rebuttal on the said 6th day of June (p. 15). The examination of the defendant John Matthews was closed on the 6th day of June (p. 16), upon which day the defendant gave the testimony alleged to be false, and contained in Exhibit B 7 (pp. 16 and 17).

Second.—But a single question is presented by this appeal, namely, whether there was a fatal variance between the allegation of the indictment and the proof in respect of the time of the commission of the alleged offence.

This question is raised :

(*a.*) By motion made in behalf of the defendant at the close of the Government's case, that the Court direct a verdict of acquittal upon the ground that there was a fatal variance between the proof and the indictment, in that the indictment charged the alleged perjury to have been committed on June

7th, 1894, when the record showed that the testimony on which the indictment for perjury was predicated, was given on June 6th, 1894 (p. 21), and the refusal of the Court so to direct (p. 22).

(*b.*) By the refusal of the Court to charge the jury as requested, that if they should find from the evidence that the alleged perjury as charged in the indictment was committed on the 6th day of June, 1894, instead of the 7th day of June, 1894, as alleged in the indictment, they must acquit (p. 22).

Both of which alleged errors are brought to this Court by the assignment of errors (p. 22).

(*c.*) By the denial by the Court of the defendant's motion in arrest of judgment (p. 13).

Point I.

It is unquestioned that as a general rule an allegation in an indictment of the time of the commission of an offence may be disregarded, and no fatal variance results in case the time proved falls prior to the indictment and within the period prescribed by the Statute of Limitations.

There are, however, some exceptions to the application of the general principle above stated, two of which will be considered, within both of which it is claimed the present case falls.

The first exception is where the indictment is for perjury and the charge is based upon a written instrument or matter of record of a specified date, or where a written instrument or record of a specified date is necessary for proof of the offence, in such case the time named in the indictment and the time shown by the proof must

agree, or a fatal variance will result. This exception is fully established by the authorities hereinafter cited, and is recognized by the Court below in the present case. The Court say (p. 12): "Where the indictment alleges the perjury to have been committed in some matter of record or in a disposition or affidavit of a certain specified date, and the record or other writing on being produced, as in such cases it must be produced, shows a different date from that alleged in the indictment, the variance is fatal because the date of the record is a material part of its identity; but where the perjury is not alleged by the indictment to be upon any matter of record or other written document, *and no written document is necessary for proof of the offence*, I do not find that the day assigned in the indictment, when stated under a *videlicet*, as in this case, is deemed material, or that the rule as respects perjury is different from the rule relating to indictments for other crimes."

In *United States* vs. *McNeal*, I Gallis, 387, the indictment was for perjury alleged to have been committed at a trial before the Circuit Court of the United States, holden at Portsmouth on the 19th day of May, A. D. 1811. On producing the record of the trial it appeared that the Circuit Court was first holden in that year on the 20th day of May, the 19th day of May being Sunday. The Court held the variance fatal and the defendant was acquitted.

The case above cited has been frequently referred to in opinions in subsequent cases and in text-books, but has never been questioned or overruled.

Rhodes vs. *Commonwealth*, 78 Va., 692, was the trial of an indictment for perjury. The Court, after stating the general rule that the time of the commission of an offense laid in the indictment is not material and does not confine the proofs within the limits of that period, say, "But when any time stated in an indictment *is to*

be proved by matter of record, a variance will be fatal, and, in an indictment for perjury, the day on which the perjury was committed must be truly laid" (citing *United States* vs. *McNeal*, *supra*, and other cases).

In *Archbold on Criminal Pleading*, page 101, the rule is stated as follows:

"Where records are produced in evidence they must be strictly conformable with the statements in the pleading they are intended to prove, the slightest variance, in substance, between the matter set out and the record produced in evidence, will be fatal."

In *Wharton's Cr. Ev. 9th Ed.*, *Sec. 103a*, the author says: "Where, also, any time stated in an indictment *is to be proved by a matter of record*, a variance will be fatal. Thus, in an indictment for perjury, the day on which the perjury was committed must be truly laid."

And in Section 115 the author continues, "When, as in case of perjury, the time of the alleged false oath enters into the essence of the offense, *and is to be shown by the records of the Court where the oath was taken*, a variance in the day is fatal. Thus if the perjury is averred to have been committed at the Circuit Court on the 19th day of May, and the record shows the Court to have been holden on the 20th day of May, the indictment is bad, and so where the assignment is pointed at an offence on a specific date." The same principle is stated in the same language by the same author in his work on Criminal Law and Practice, 8th Ed., Sec. 135. The same author in his work on criminal law, 9th Ed., Vol. 2, Sec. 1314, says: "Any variance, as has already been said, in the setting forth of a record is at common law fatal, though under recent statutes mere formal variances are cured by verdict or may be amended on trial. The day on which the offence occurred, being matter of record, must, at common law, be correctly

laid; and if there be a variance from the record on this point the indictment is bad."

And in Section 1391, "If the facts be stated as to the time and place, with uncertainty or repugnancy, the indictment will be bad. And *a variance as to time of oath, when the latter is proved by record is fatal.*

The same author, in his work on American Criminal Law, 4th and Revised Edition, Sec. 375, under the title of "Cases where Date is Material," says, "*If any time stated in the indictment is to be proved by matter of record* it must be truly stated."

And in Sec. 2271, page 681, under the heading of "Evidence in Perjury Cases," as follows:

"The day on which the offence occurred, being matter of record, must be correctly laid and if there be a variance between the record on this point the indictment will be bad."

And in Section 268, as follows:

"Where any matter laid in an indictment *is to be proved by the record* great care must be taken that the statement corresponds exactly with the record for the slightest variance in substance will be fatal."

And in Section 609, as follows:

"So where in an indictment for perjury, a variance appeared between the day on which the false oath was averred to have been taken and the day as proved by the record, the variance was held to be fatal."

In Archbold Cr. Pr. and Pl., Vol. 1, page 389 (Waterman's Notes), the principle is stated as follows:

"Thirdly, if any time stated in the pleading is to be proved by matter of record it must be correctly stated (citing authorities). In these several respects any—the slightest—variance between the time so stated and that appearing from the instrument or record when produced will, in felonies, be fatal."

And in Vol. 2, page 973, as follows:

"The day on which the offence occurred, being a matter of record, must be correctly laid; and if there be a variance on this point between the record and proof the indictment will be bad."

The foregoing authorities seem to establish beyond controversy two propositions, namely:

1st. That where an indictment for perjury is based upon a written instrument or record the time named in the indictment as the day of the commission of the offence, must concur with the written instrument or record when produced.

2d. Where in an indictment for perjury the offence, or the day of its commission, is to be proved by a record, the day alleged in the indictment and the day shown by the record must agree or a fatal variance will result.

It is claimed that the present case falls within the second proposition above mentioned. The indictment alleged the oath to have been taken, and the false testimony to have been given on the 7th day of June, 1894. The proof showed the oath to have been taken on the 5th day of June, and the testimony alleged to have been false to have been given on the 6th day of June, 1894.

Upon the trial, the Government, as a part of its case, and to prove both the testimony alleged to have been false and the date upon which it was given, introduced the record of the former trial (page 16).

"The United States, as a part of the Government's case, and to prove the record of the former trial, offers in evidence the transcript of the stenographer's minutes, which were marked 'B1, B2, B3, B4, B5, B6 B7, B8.'"

B7 contained the testimony alleged to have been false and showed that it was given on the 6th day of June. The Government's case rested, both in respect of the testimony given and the day upon which it was given, upon the record produced. The printed case shows that the stenographer was called by order of the Court to prove the dates, but his testimony was based solely upon the written record, and he does not profess to have any recollection of, or to testify as to the dates except as shown by the record, and he gives no evidence as to what was testified to by the defendant upon the former trial, but reliance is had solely upon the record of such former trial (p. 17).

The Court below in its opinion denying the motion in arrest of judgment, say: "The indictment does not refer to any record or other writing, and no record or other writing was necessary for the proof of the offence."

It is respectfully insisted that the record of the former trial and the written official minutes of the Court were used by the Government for the proof of the offence; that such record or writing was necessary for such proof as being the best evidence and the only available evidence, and that upon which the Government relied to secure the conviction of the defendant. The case seems clearly to be brought within the principle above stated in proposition second.

Point II.

A further exception to the general rule, that allegations of time in an indictment may be disregarded, is where time is laid in descriptive terms, in which case a variance between the allegation in the indictment and

proof will be fatal. This rule applies especially to allegations of time and place.

In regard to allegation of time, Bishop in his work on Criminal Procedure, Vol. 1, Sec. 401, subdivision 4, says, "If time is laid in descriptive terms—a method to be avoided when possible—the proof must fit the averment, else there will be a variance." And the following illustration is given referring to the case of United States *vs.* McNeal, *supra*, "On a charge of perjury—in swearing, says the report, at a trial before the Circuit Court of the United States holden at Portsmouth on the 19th day of May, A. D. 1811, a record which showed this Court to have been in that year holden on the 20th day of May, the 19th day of May being Sunday, was rejected as not sustaining the allegation. The liability of the pleader incautiously to make the allegation of the time this offence thus descriptive, and the consequence when he mistakes the date, are probably the origin of the mistake, occasionally appearing in the books, that, speaking in general terms, the common law indictment for perjury must allege correctly, and the evidence must so prove, the day of its commission, or there will be a fatal variance."

It will be seen that the author, while repudiating the mistake referred to, recognizes the fact that where the time is laid in descriptive terms the proof must fit the averment, and the illustration given clearly brings the present case within the principle stated by him. The same author, in section 485, states how the variance may be avoided, namely: "If, in the particular instance, the whole larger allegation wherein it occurs may be rejected as surplusage. But if a necessary allegation is made unnecessarily minute in description, the proof must satisfy the descriptive as well as main part, since the one is essential to the identity of the other."

And in Section 487 the limit of this doctrine is stated,

namely: "That if the entire averment, wherein occurs the descriptive matter, is surplusage, all may be rejected, so no harm comes from the variance."

The application of this rule to allegations of place and other descriptive matter is illustrated by numerous cases, which are instructive upon the question as to what allegations are to be regarded as descriptive.

In *United States* vs. *Keen*, 1 McLean, 429, the indictment was for stealing a letter which contained a bank note and a draft from the mail; the draft was described as signed "Joseph Johnson." The draft offered in evidence was signed "Jos. Johnson." It was held that it was unnecessary to allege by whom the draft was drawn, but having made the allegation it was by way of description, and the variance was fatal, as to the counts of the indictment containing the defective description.

In *United States* vs. *Brown*, 3 McLean, 233, the indictment was for stealing from the mail a letter containing bank notes, the property of a person named. It was held that while it was unnecessary to describe the bank notes, or to allege by whom they were owned, yet having done so the allegation was descriptive and must be proved as alleged.

In *State* vs. *Jackson*, 30 Me., 29, the indictment for larceny contained a description of the property stolen. It was held that such description was unnecessary, but having been alleged a variance between the allegation and the proof was fatal.

In *Moore* vs. *State*, 12 Ohio, 387, the indictment charged the unlawful selling of liquor in the store of M, in the Township of A. The proof showed a sale in the store of M, in the Township of G, in the same county. The variance was held to be fatal.

In *People* vs. *Slater*, 5 Hill, N. Y., 401, the indictment was for arson, and described a building situate in

the Sixth Ward of the city of New York. The proof showed that the building was in the Fifth Ward. It was held that the allegation was descriptive and that the variance was fatal.

It may be conceded, for the purpose of the present argument, that allegations in the indictment as to the time of the commencement of the trial, and that, upon said trial, the defendant was sworn, and gave the false testimony specified, would have been sufficient without an allegation as to the particular date upon which the false testimony was given, but, the pleader having chosen to make such additional averment in descriptive terms, the Government was bound to fit the averment with proof of the day alleged, under the rule laid down by Bishop, above stated. Such descriptive matter can not be rejected as surplussage unless the entire averment respecting time can also be rejected as surplusage.

Point III.

The Court below, in its opinion denying the motion in arrest of judgment, lays stress upon the fact that the allegation of time in the indictment is under a *videlicet ;* as to this it is to be noted :

1st. That the allegation of the day upon which the testimony alleged to be false was given is not under a *videlicet.* The allegation is (page 6), "having taken his oath as aforesaid on the said 7th day of June, in the said year of our Lord, one thousand eight hundred and ninety-four * * * did falsely, etc., * * * swear."

2d. Bishop, in his work on Criminal Procedure, Vol. 1, Sec. 406, condemns the use of the *videlicet*

in modern practice as 'being attended with few practicable advantages' and his 'Practical Conclusion' is that it is best for the pleader, at the present day, when pleadings are being simplified and minute defects are less regarded than formerly, and plain and direct language is more favored, to have nothing to do with the *videlicet*, unless in exceptional circumstances."

Point IV.

The judgment of the Circuit Court should be reversed and the Circuit Court directed to enter an order discharging the plaintiff in error.

HESS, TOWNSEND & MCCLELLAND,
Attorneys for Plaintiff in Error,
40–42 Wall Street,
New York City.

W. J. TOWNSEND,
Of Counsel.

FEB 25
JAMES H. McKENNEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JOHN MATTHEWS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 778.

IN ERROR TO AND APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR RESPONDENT AND DEFENDANT IN ERROR.

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Point IV.

The judgment of the Circuit Court should be reversed and the Circuit Court directed to enter an order discharging the plaintiff in error.

HESS, TOWNSEND & MCCLELLAND,
Attorneys for Plaintiff in Error,
40–42 Wall Street,
New York City.

W. J. TOWNSEND,
Of Counsel.

FILED.
FEB 25 1896
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JOHN MATTHEWS, PLAINTIFF IN ERROR,
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IN ERROR TO AND APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR RESPONDENT AND DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JOHN MATTHEWS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 778.

IN ERROR TO AND APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR RESPONDENT AND DEFENDANT IN ERROR.

The appeal herein must be dismissed under *Bucklin* v. *United States*, 159 U. S., 680.

The writ of error, like the appeal, is taken from the judgment entered April 25, 1895, for the conviction of John Matthews for perjury under § 5392 of the Revised Statutes.

The indictment charged that upon the trial of a prior indictment pending in the court against himself and others, this defendant, John Matthews, was sworn on June 7, 1894, as a witness, and that "it then and there,

upon the trial of the said issue, became and was a material matter and inquiry" whether in July, 1893, he "did have business of any kind with one Moses Davis personally or at the office of the said Moses Davis in the city of Montreal, Canada" (p. 5); that he swore that he "did not have any business of any kind with one Moses Davis personally or at the office of said Moses Davis in said city of Montreal, Canada," at that time; and never saw Davis until he saw him on the witness stand in May, 1894 (p. 6); "whereas, in truth and fact, he, the said John Matthews, did have business with one Moses Davis personally in the city of Montreal, Canada," on July 11 and 12, 1893 (p. 7). The indictment is very long and unnecessary to set forth. The case was tried before Judge Addison Brown and a jury, and defendant convicted as aforesaid.

ARGUMENT.

We take up the assignments of error *seriatim*.

I. Henry I. Thornton, "a clerk attached to the criminal part of the United States circuit court," testified that said trial commenced May 24, 1894, and lasted until June 7, and that he himself administered the oath to the defendant, Matthews. The question was then asked: "Q. You were at that time clerk of the court?" It was objected to as "incompetent, improper, and not the best evidence." The objection was overruled, and the defendant excepted. The witness answered: "I presume so." It appears that Judge Benedict presided at the trial, and the oath was administered in his presence (pp. 14–15).

The oath is not administered by the clerk or the deputy clerk, but by the court. (Rev. St., § 725.) The clerk or deputy clerk acts merely under direction of the judge, and is his instrument. It is therefore unnecessary to prove that the office of the clerk or deputy is held *de jure*. (See *Izer* v. *State*, 77 Md., 110; *Wright* v. *United States*, 158 U. S., 232, 233; 2 Bish. New Crim. Proc., § 1020; *Oaks* v. *Rodgers*, 48 Cal., 197.)

In *Server* v. *State*, 2 Blackf., 35, the court—

> *Held*, That no proof of the appointment of the deputy clerk was necessary; that in administering the oath S. C. acted under the superintendence of the court, and that the oath was as obligatory as if it had been administered by one of the judges.

It is presumed, however, that Thornton was a duly appointed clerk, simply because he acted as such. (*Ingraham* v. *United States*, 155 U. S., 434, 438; *Keely* v. *Sanders*, 99 U. S., 441; 1 Greenleaf Ev., § 92; *Goode* v. *United States*, 159 U. S. 663, 672–3.)

II. Moses Davis was called as a witness, and testified that he met Matthews for the first time in July, 1893, at his office in Montreal, and had business transactions with him about July 11 or 12. This was objected to "as immaterial, incompetent, and improper," on the ground that the attention of the witness should be called to a particular portion of Matthews's testimony which was claimed to be false. This objection was overruled, exception taken, and in answer to a question Davis narrated the business transactions which he had with Matthews. These transactions were not objectionable upon any ground.

They tended to show that the two men were together long enough to get acquainted, so that the jury could conclude that Davis had seen enough of Matthews to be able to recognize him again without mistake. They also tended to show that the business was such in character and extent as could not have been forgotten by Matthews any more than by Davis; so that Matthews's denial of the conversation under oath was wilful.

III. It was stipulated in open court "that a transcript of the testimony of the former trial may be read in evidence" (p. 16). When the transcript came to be read certain portions were objected to, apparently because they were quotations from a book which had been used as an exhibit on the former trial (p. 21). In view of the stipulation it is difficult to understand the objection. There is no doubt that even on a criminal trial the defendant could waive the personal appearance of the witness and allow his testimony elsewhere taken to be read in evidence. The right to be confronted with witnesses under the Sixth Amendment of the Constitution is undoubtedly one which can be waived. (*United States* v. *Loughery*, 13 Blatchf., 267; *People* v. *Guidici*, 100 N. Y., 503, 508; see also *Reynolds* v. *United States*, 98 U. S., 145, 160; *United States* v. *Gale*, 109 U. S., 65; *Matter of Cooper*, 93 N. Y., 507; 1 Bish. New Crim. Proc., § 1205.)

This, like the two former objections, is unnoticed in the brief which has been filed here on behalf of Matthews since the foregoing was in type.

IV. It is claimed that an acquittal should have been directed on two grounds.

First, that it did not appear from the indictment "that any of the allegations as to which and on which this prosecution for perjury is projected was material on the trial of the issue on the indictment for conspiracy." The indictment charged as to materiality in general terms, and that is enough. (*Markham* v. *United States*, 160 U. S., 319.)

Second, that the indictment charged "the perjury to have been committed on June 7, while the records showed that it was committed on June 6." This variance is immaterial. (1 Bish. New Crim. Proc., §§ 400, 401; opinion of Judge Brown, Record, pp. 12, 13; Rev. St., § 1025.)

The date is stated once under a *videlicet* (p. 5); once by reference, but without repeating the *videlicet* (p. 6), and again, without a *videlicet*, in the final peroration of the indictment, which seems, however, to be an immaterial clause. (See *Frisbie* v. *United States*, 157 U. S., 160, 168.) The concession that the date need not have been stated involves a concession that the error in stating it is one of form and at any rate waived by not making objection to the variance when the evidence was offered.

The learned counsel for Matthews is in error in supposing that the date of his client's testimony upon the former trial is matter of record. Stenographers' minutes are not records. They are in the nature of parol evidence. These here were admitted by stipulation (p. 16). Otherwise they could have been used only as *memoranda*

to refresh the memory of the stenographer. Judge Brown's reference to "the record," using the phrase in a colloquial sense, can not have the effect of changing the rules of pleading and evidence by making that a record which was not a record before. Testimony of witnesses becomes part of the record only when incorporated therein by means of a bill of exceptions. (See *Suydam* v. *Williamson*, 20 How., 427, 433.)

It is therefore unnecessary to consider at length the authorities referred to by him. There is nothing to take this case out of the general rule.

In *United States* v. *Le Baron* (4 Wall., 642, 648) Mr. Justice Miller said:

> An indictment charging a prisoner with murder on the 1st day of July would be sustained by proving a murder committed on the 15th of that month.

The prisoner was correctly informed as to the date when the trial was commenced in which his perjury was committed, and as to the names of the parties. This was surely enough.

V. This is a repetition in a different form of the objection last considered.

It is respectfully submitted that the judgment should be affirmed.

EDWARD B. WHITNEY,
Assistant Attorney General.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JOHN MATTHEWS, PLAINTIFF IN ERROR and appellant,
v.
THE UNITED STATES.
No. 778.

IN ERROR TO AND APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

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OCTOBER TERM, 1895.

JOHN MATTHEWS, PLAINTIFF IN ERROR and appellant,
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IN ERROR TO AND APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

The plaintiff in error was indicted on June 19, 1894, for perjury as a witness, in violation of section 5392, Revised Statutes, and on January 15, 1895, was found guilty as charged and sentenced to imprisonment for three years and six months in Kings County Penitentiary. Being unable to give bail in the sum of $7,500, he is now serving out his sentence.

At the request and on behalf of the counsel for the plaintiff in error, the Solicitor-General respectfully moves

the court to advance the case on the docket and set it down for hearing on such day during the present term as may be convenient to the court, the Government consenting, if the court shall deem it proper to grant the motion.

HOLMES CONRAD,
Solicitor-General.